TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 208.

JARIB L. SANDERSON, SURVIVING PARTNER OF THE FIRM OF BARLOW, SANDERSON & COMPANY, APPELLANT,

vs.

THE UNITED STATES AND THE CHEYENNE TRIBE OR NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 22, 1907.

(20,541.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 576.

JARIB L. SANDERSON, SURVIVING PARTNER OF THE FIRM OF BARLOW, SANDERSON & COMPANY, APPELLANT,

vs.

THE UNITED STATES AND THE CHEYENNE TRIBE OR NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 28, 1907.

1 In the Court of Claims.

No. 2304, Indian Depredation.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,

vs.

THE UNITED STATES and THE CHEYENNE INDIANS.

I.—*Petition. Filed June* 8, 1891.

I.

To the Judges of the United States Court of Claims:

Your petitioner, Jarib L. Sanderson, respectfully represents that he is a citizen of the United States and a resident of Boulder, in the State of Colorado.

That in the year 1867, Bradley Barlow, Thomas J. Barnum, and the petitioner were partners in business under the firm name and style of Barlow, Sanderson and Company, owning and operating the Southern Overland Mail and Express Route, between the then terminus of the Union Pacific Railway and the city of Santa Fé, New Mexico, and were then engaged, among other things, in carrying the mails of the United States between those points, and for that purpose,

2 at the time of the committing of the depredations by the tribe of the Cheyenne Indians hereinafter more particularly set forth, were lawfully within the territory of said tribe.

That the said Thomas J. Barnum departed this life about the year 1876, and the said Bradley Barlow departed this life in February, 1890, and the petitioner is the sole surviving partner of said firm, and as such brings this his petition to this honorable Court.

II.

And the petitioner thereupon shows that the said firm, at the time of the committing of the depredations hereinafter specifically set forth, were the owners of the thirty-seven mules and six horses which were taken unlawfully and by force or stealth by the said tribe of Cheyenne Indians from their possession at places on the line of the said mail route and on the days next following—that is to say:

1867.		
May 12th,	at Cimmerron Ranch.....	17 mules.
" 15th,	" Plumb Creek.....	5 mules, 2 horses.
" 25th,	" Pretty Encampment.....	8 mules.
" 25th,	near " "	2 mules.
June 29th,	at Plumb Creek.....	4 mules, 4 horses.
Sept. 20th,	" Coon Creek.....	1 mule.
	In all.....	37 mules, 6 horses.

III.

And the petitioner further shows that the value of each of said animals at the time of the illegal seizure thereof by the said Cheyenne Indians as aforesaid was the sum of two hundred and fifty dollars, and that a claim for damages on account thereof was duly submitted to the investigation of the Secretary of the Interior under the acts of Congress of March, 1885, and May, 1886, and the same was duly investigated by the said Secretary of the Interior and the facts were found by him and reported to Congress on the 7th day of December, 1886, which report of the Secretary of the Interior has never been modified or otherwise changed and still exists among the records of the Congress as well as of the Department of the Interior, and the petitioner respectfully refers to the same and makes the same a part of this petition.

That the said Secretary of the Interior found, as appears in and by said report, that the said firm had a just and equitable claim upon the United States, fixing the value of the animals, however, at the sum of one hundred and eighty dollars each, and recommended the payment of the sum of seven thousand seven hundred and forty dollars thereon.

That while the Secretary of the Interior found that the value of the animals at the time the said depredations were committed was the sum of two hundred and fifty dollars each, as the claimants then averred, and as the petitioner now believes, yet the said Secretary recommended to Congress, as the currency of the country at the time of the taking of the property was depreciated, that the amount due should be ascertained by a comparative reference to the value of the currency at the time of the submission of the claim to him under said acts of Congress, and on this account, and no other, recommended that the sum of two hundred and fifty dollars for each of said animals, which he found to have been their value at the time they were taken, should not be paid, but that the sum of one hundred and eighty dollars for each of said animals only should be paid, which latter sum he estimated to be their value if paid in the currency of the country at the time of his adjudication.

That while the petitioner feels that this construction of the claim of the petitioner was a very grave injustice, and that upon the facts found by the honorable the Secretary of the Interior the value of said animals should have been placed at two hundred and fifty dollars each, still, in view of the extreme age and infirmity of the
3 petitioner, and the delays and expense of prosecuting his claim, the petitioner has decided not to attempt to correct the manifest injustice by electing to re-open the question, but to permit the finding of the honorable Secretary of the Interior to stand, unless the Attorney General shall elect to re-open the case, in which latter event, and only then, the petitioner will insist that he ought to recover the whole sum of ten thousand seven hundred and fifty dollars.

IV.

Your petitioner further states that the said tribe of Indians, at the time said losses occurred, were in amity with the United States; and

the United States has supervisory charge of the said tribe of Indians, and is justly indebted to your petitioner in the said sum of seven thousand seven hundred and forty dollars, according to the report of the said Secretary of the Interior, estimating the value of said property in currency as of the time when the said claim was submitted, or in the sum of ten thousand seven hundred and fifty dollars, if the value of said property be estimated as of the time when the same was illegally taken by the said Cheyenne Indians.

V.

Your petitioner further states that he duly presented his said claim to the Secretary of the Interior for payment, but the same has not been paid, nor has any portion thereof been paid, either to the petitioner or to any member of the said firm of which he is the surviving partner as aforesaid or to any one on their behalf.

VI.

Your petitioner therefore prays that he may have judgment against the United States for the said sum of seven thousand seven hundred and forty dollars or the sum of ten thousand seven hundred and fifty dollars, according to the course which the honorable the Attorney General may elect to pursue in the adjudication of this matter, in pursuance of the act of Congress approved March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations."

JAREB L. SANDERSON,
Surviving Partner,
By A. G. SAFFORD,
Attorney-in-Fact.

DISTRICT OF COLUMBIA, *City of Washington, ss:*

Be it remembered that at the city of Washington, in said District, on this second day of June, A. D. 1891, then personally appeared A. G. Safford, of Washington aforesaid, who, being first duly sworn according to law, on oath says that he is the attorney-in-fact for Jarib L. Sanderson, as surviving partner of the firm of Barlow, Sanderson & Company, and that the matters and things set forth in the foregoing petition by him subscribed are true, as he verily believes.

Witness my hand and notarial seal this 2nd day of June, A. D. 1891.

[SEAL.] MARTIN S. DECKER,
Notary Public for the District of Columbia.

4 II.—*Stipulation and Submission.*

In the Court of Claims.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surv. Partner of the Firm of Barlow, Sanderson & Co.,

vs.

THE UNITED STATES and THE CHEYENNE TRIBE, BAND, OR NATION OF INDIANS.

Stipulation of Facts in Allowed Claims.

It is hereby stipulated and agreed on the part of claimant in the above-entitled cause by A. G. Safford, Attorney of Record, and on the part of the Government by L. W. Colby, Assistant Attorney General, in charge of Indian Depredation Cases, that the following facts are shown by the original papers, evidence, records, and reports from Governmental Departments on file in the office of the clerk of said Court:

I. That Bradley, Barlow, Jarib L. Sanderson and Thomas J. Barnum, the original claimants was, at the time of the commission of the depredations complained of, a citizen of the United States.

II. That on 12, 15, 25 days of May 1867 and 29 June, 20 Sept. 1867, at or near Kansas certain Indians belonging to the said Cheyenne tribe, band, or nation, took or destroyed property belonging to the said original claimant without just cause or provocation on the part of the owner or agent in charge, and that the same has not been returned or paid for, and was at said time and place of the value of $7,740.00.

III. That the said Cheyenne tribe, band, or nation of Indians were, at the time of the commission of said depredations, in amity and treaty relations with the United States.

IV. That on the 7th day of December, 1886, a claim for said property, so taken or destroyed, was examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the Act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30,
1886, and for other purposes, approved March 3, 1885, and
5 subsequent Indian appropriation acts, in the sum of $7740.00
in favor of said Barlow, Sanderson & Co. and thereafter reported with such allowance to Congress by Executive Document No. 77, of the 2d Session of the 49th Congress of the United States, as Claim No. 749.

V. That * * *

VI. That neither the said claimant nor the United States elects to reopen said case, and try the same before the Court; but the claimant is willing to accept said allowance in full satisfaction and settle-

ment of said claim, and asks to have judgment rendered therefor by said Court under the Act of Congress approved March 3, 1891, entitled "An Act to provide for the adjudication and payment of claims arising from Indian Depredations."

A. G. SAFFORD,
Attorney for Claimant.
L. W. COLBY,
Assistant Attorney General.

And it further appearing that on the 30th of June, 1892, the above case was submitted on the above stipulation of facts by A. G. Safford, for claimant, and L. S. Colby, Assistant Attorney General, for the defendants.
June 30, 1892.

6 III.—*Judgment for Claimant.*

Entered October 11, 1892.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surviving partner of the Firm of Barlow, Sanderson and Company,
vs.
THE UNITED STATES and THE CHEYENNE TRIBE OR NATION OF INDIANS.

At a Court of Claims held in the City of Washington, on the 11th day of October A. D. 1892, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant Jarib L. Sanderson surviving partner of the firm of Barlow Sanderson and Company do have and recover of and from the United States and the Cheyenne Tribe or Nation of Indians, committing the wrong for which this judgment is rendered, the sum of Seven Thousand Seven Hundred and Forty Dollars ($7740) of which sum there is allowed A. G. Safford Esq. the Claimant's Attorney, for prosecuting said Claim, the sum of Five Hundred and Forty Dollars ($540) fixed by the Court according to the provisions of the Act of March 3, 1891, Chapter 538, Section 9 (1, Supplement of Revised Statutes, 2d Edition, pages 915, 916).

BY THE COURT.

7 *Motion for a New Trial under Section* 1088 *of the Revised Statutes Filed by the United States and Allowance of Same.*

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surv. Partner,
vs.
THE UNITED STATES and THE CHEYENNE INDIANS.

Motion for a New Trial on Behalf of the United States.

In this cause, in which judgment was rendered for the claimant in the sum of $7740., on the 11th day of October, 1892, comes the Assistant Attorney General for and on behalf of the United States, and moves the Court for a new trial thereof, in accordance with the provisions of Section 1088 of the Revised Statutes of the United States, for the reason that, in the award of said judgment, wrong and injustice was done to the United States in this, that—

The defendants, the Cheyenne Indians, were not in amity with the United States at the time of the depredations which form the basis of the suit.

CHAS. B. HOWRY,
Assistant Attorney General.

Filed October 6, 1894.

Allowed: By the Court, April 13, 1896.
WILLIAM A. RICHARDSON,
Chief Justice.

8 *Finding of Fact and Conclusion of Law Dismissing Petition.*

Filed April 23, 1906.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,
vs.
THE UNITED STATES and THE CHEYENNE INDIANS.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Finding.

At the time of the several depredations alleged in the petition, the defendant Indians were hostile.

Conclusion of Law.

Upon the foregoing finding, the court decides, as a conclusion of law, that the petition be, and the same is hereby, dismissed.

BY THE COURT.

9 *Final Judgment of the Court.*

Entered April 23, 1906.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,

vs.

THE UNITED STATES and CHEYENNE TRIBE OR NATION OF INDIANS.

At a Court of Claims held in the City of Washington, on the 23rd day of April, A. D., 1906, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the petition of the said Jarib L. Sanderson, surviving partner of the firm of Barlow, Sanderson and Company be, and the same is hereby dismissed.

BY THE COURT.

10 *Claimant's Motion for New Trial.*

Filed September 17, 1906.

Comes now the claimant by Ralston and Siddons and William E. Richardson, his attorneys, and moves this Honorable Court to grant a new trial; to vacate the judgment rendered in this cause on the 23rd day of April, A. D. 1906, and to affirm the original judgment herein entered on October 11, 1892. * * *

RALSTON & SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Claimant.

Order of Court Overruling Claimant's Motion for a New Trial.

Entered December 17, 1906.

Order.

The claimant's motion for a New Trial herein is overruled on the authority of the case of Belloeq (13 C. Cls. 195) and the case of McCullum (33 C. Cls., 469).

BY THE COURT.

11 *Application for and Allowance of Appeal to the Supreme Court of the United States.*

Indian Depredations, No. 2304.

JARIB L. SANDERSON, Surviving Partner of Barlow, Sanderson & Company,

vs.

THE UNITED STATES and CHEYENNE TRIBE OF INDIANS.

The claimant, by Ralston and Siddons, his attorneys, respectfully requests that an appeal to the Supreme Court of the United States be allowed from the action of this court in dismissing said case and overruling his motion for new trial.

RALSTON & SIDDONS,
Attorneys of Record.

Filed December 24, 1906.

Ordered, this 24th day of December, 1906, that the above appeal be allowed as prayed for.

BY THE COURT.

12 Court of Claims.

No. 2304, Indian Depredation.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,

vs.

THE UNITED STATES and THE CHEYENNE INDIANS.

I John Randolph Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and judgments of the Court, of the motions for new trial and the orders of Court thereon, of the application of claimant for an allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the Seal of the Court of Claims this 17 day of January 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 20,541. Court of Claims. Term No. 576. Jarib L. Sanderson, surviving partner of the firm of Barlow, Sanderson & Company, appellant, *vs.* The United States and The Cheyenne Tribe or Nation of Indians. Filed January 22d, 1907. File No. 20,541.

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 208.

In the Supreme Court of the United States

OCTOBER TERM, 1906

[redacted]

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson & Company, APPELLANT

v.

THE UNITED STATES and the CHEYENNE TRIBE OR NATION OF INDIANS, APPELLEES

Brief for Appellant

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Claimant

12361 GEO. B. HOWARD, PR.

In the Supreme Court of the United States

OCTOBER TERM, 1907

No. 208

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson & Company, APPELLANT

v.

THE UNITED STATES and the CHEYENNE TRIBE OR NATION OF INDIANS, APPELLEES

Brief for Appellant

STATEMENT OF FACTS

This is an appeal by the claimant from a final judgment of the Court of Claims, entered April 23, 1906, dismissing his petition.

In the petition filed in that court on June 8, 1891, under the Indian Depredation Act of March 3, 1891 (26 Stat. L., 851), the claimant states that in the year 1867, Bradley Barlow, Thomas J. Barnum, and the petitioner, as business partners under the firm name of "Barlow, Sanderson &

Company," owned and operated the Southern Overland Mail and Express Route, between the then terminus of the Union Pacific Railway and the City of Santa Fé, N. Mex.; that they were engaged, among other things, in carrying the mails of the United States between these points, and at the time of the depredations by the defendant Cheyenne Indians, were lawfully within the territory of said tribe; that said Barnum and Barlow are both deceased, and the petitioner, now the appellant, prosecutes this suit as sole surviving partner.

The petitioner further states that the defendant Cheyenne Indians, at various times during the summer of 1867, and at various places on their mail and express route, unlawfully and by force or stealth, took from the possession of said firm certain stock, the property of said firm, then and there reasonably worth the sum of ten thousand five hundred and fifty dollars; that a claim for damages on account thereof was duly submitted to the investigation of the Secretary of the Interior, under the acts of Congress of March, 1885, and May, 1886, and that after investigation the said Secretary of the Interior, on December 7, 1886, reported to Congress an award of seven thousand, seven hundred and forty dollars; that no part of said award was paid. The petition further states that the only cause assigned by the Secretary of the Interior for diminishing the amount demanded by the claimant was that the value of the stock in 1867 was enhanced by reason of the depreciation of the national currency at that time, and should be accordingly reduced if paid after such currency had regained its normal value; that petitioner feels that this construction of the law was a grave injustice to him; still, in view of his extreme age and infirmity, and the delays and expenses of prosecuting his suit, he has decided not to reopen the case, but to accept judgment for the award of the Secretary of the Interior, unless the Attorney-General shall elect to reopen the case.

The petition also alleges that said defendant Indians were in amity with the United States at the time of the commission of the depredations, and prays judgment for the sum of seven thousand, seven hundred and forty dollars, awarded by the Interior Department.

On June 30, 1892, more than one year after the claimant had filed his petition and elected to accept the award of the Secretary of the Interior, the Assistant Attorney-General, charged with the defense of Indian Depredation Claims in the Court of Claims, likewise elected to accept this award, and to have judgment rendered therefor, as provided by the Act of March 3, 1891, *supra*, and thereupon the counsel for both parties entered into the stipulation of facts (Rec., pages 3 and 4), reciting that the facts therein agreed to "are shown by the original papers, evidence, records, and reports from governmental departments on file in the office of the clerk of said court."

Among the matters so stipulated are as follows: The value of the property taken by the defendant Indians in the amount awarded by the Secretary of the Interior; that the Indian defendants were, at the time of the commission of said depredations, in amity with the United States; that this claim was duly examined, approved, and allowed by the Secretary of the Interior, under the Act of Congress of March 3, 1885, and subsequent Indian appropriation acts, in the sum of seven thousand, seven hundred and forty dollars, and was so reported to Congress, and that the parties elect not to reopen the case, but to accept judgment for the amount awarded as above stated.

On the same day, June 30, 1892, the case was submitted on the stipulation of facts and election to accept judgment on the award, signed by counsel for claimant and the Assistant Attorney-General, representing the defendants. On October 11, 1892, the Court of Claims entered judgment in favor of the claimant and against the United States and defendant Indians for the sum of seven thousand, seven hundred and forty dollars (Rec., page 5).

On October 6, 1894, one year and three hundred and sixty days after the rendition of the final judgment in favor of the claimant, the Assistant Attorney-General, on behalf of the United States, filed a motion for new trial under Section 1088, of the Revised Statutes of the United States, alleging that "in the award of said judgment, wrong and injustice was done the United States in this, that the defendants, the Cheyenne Indians, were not in amity with the United States at the time of the depredations." No evidence was filed to accompany said motion, but on January 4, 1895, two years and three months after the judgment was entered, one affidavit in support of the motion was filed.

On April 13, 1896, the Court of Claims allowed this motion for new trial.

During the two years succeeding the entry of said judgment on October 11, 1892, the only action taken in this case was the filing of the above motion for new trial in the office of the clerk of said court.

Subsequent to the granting of the motion for new trial, the parties prepared this case for trial, and the same, having been duly submitted and argued, the Court, on April 23, 1906, decided that the defendant Indians were hostile at the time of the several depredations alleged in the petition, and ordered that the petition be dismissed. The claimant, on September 17, 1906, presented his motion to grant a new trial, to vacate the judgment entered on April 23, 1906, and to affirm the original judgment of October 11, 1892, for various reasons reiterated here in the assignment of errors. This motion was overruled by the Court of Claims on December 17, 1906, whereupon the claimant has appealed to this Court.

In view of the fact that the Court made no specific finding of facts upon the question of amity, the contention of the claimant, with relation to that question, can not be submitted to this Court. The present appeal, therefore, is solely directed to the review of certain alleged er-

rors of the Court of Claims in vacating the judgment of October 11, 1892, and dismissing the claimant's petition.

The appellant, therefore, makes the following

ASSIGNMENT OF ERRORS

First. The Court of Claims had no jurisdiction to grant the defendants' motion for a new trial on April 13, 1896, because more than two years had expired after the entry of final judgment on October 11, 1892.

Second. The Court of Claims erred in granting defendants' motion for new trial on April 13, 1896, because the defendants had not presented a proper application for new trial within two years after the entry of final judgment on October 11, 1892.

Third. The Court erred in granting the defendants' motion for new trial because said judgment of October 11, 1892, was entered by consent upon an agreed statement of facts, and upon the election of both parties not to reopen the award of the Secretary of the Interior.

Fourth. The Court erred in allowing the defendants' motion for new trial on April 13, 1896, because the question raised by said motion was a question of law, and not a question of fact, and, therefore, the said judgment became final at the expiration of the term at which it was entered.

Fifth. The Court erred in granting defendants' motion for new trial because in the present suit the defendant Indians were the responsible parties defendant, and the judgment, when entered, was under the terms of the Indian Depredation Act of March 3, 1891, payable out of the funds of said tribe, and the United States had no pecuniary interest or liability in said case, for which reason the provisions of Section 1088 of the Revised Statutes of the United States were not applicable.

Sixth. The Court erred in dismissing claimant's petition on April 23, 1906, because the judgment of October 11, 1892, in so far as the same was against the defendant Chey-

enne Indians, was then a valid and subsisting judgment, and in full force and effect, no proceedings to vacate the same having been instituted.

ARGUMENT

The several assignments of error depend principally upon the interpretation to be placed on Section 1088 of the Revised Statutes of the United States. This statute, which constitutes the sole authority for the Court of Claims to entertain a motion for new trial filed after the expiration of the term at which judgment was entered (In re District of Columbia, 180 U. S., 250; Belknap *v.* U. S., 150 U. S., 588), reads as follows:

> "The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

The first assignment of error presents the question whether the Court had power, under this statute, to vacate a judgment by granting a motion for new trial four years after the judgment was entered. This question relates to the procedure of the Court of Claims in cases coming before it in all of its many subjects of jurisdiction, and the conflict which has existed between the decisions of that court and the frequent expressions of opinion found in the reports of this court render it highly important that the question be authoritatively determined.

That the Supreme Court will review this issue on appeal from final judgment after the motion for new trial has been granted, and that it is only by means of such appeal that this court can act, was settled by the decisions in the case of Young, trustee, *v.* U. S., 94 U. S. (4 Otto), 258, and 95 U. S. (5 Otto), 641.

In that case the claimant sought to review the order granting the defendants' motion for new trial, under Revised Statutes 1088, because of alleged insufficiency in the evidence supporting the motion. In the opinion reported in 95 U. S., 641, Mr. Chief Justice Waite says:

> "The transcript of the record sent here contains the motion of the United States for the new trial and the action of the court thereon, but not the affidavits filed in support of or in opposition to the motion. The appellant now moves for a writ of certiorari to bring here these affidavits, with the papers and documents appended thereto.
>
> * * * * * * *
>
> "When this case was before us at the last term, upon the application for writ of certiorari to bring up the proceedings of the Court of Claims in granting the new trial, it was contended that the court had proceeded 'without jurisdiction, power, or authority;' and, in denying the writ, we said: 'The proceedings under which the new trial was obtained are now part of the record below, and, after judgment is finally rendered, may be brought here by appeal for review.' They are now here, and the record, instead of showing that the court did not have jurisdiction to proceed, shows affirmatively that it had. The motion, as made, brings the case directly within the statute. That being so, the objection as to the jurisdiction of the court, which alone we were then considering, is answered. A case having been made upon the record, such as would justify its

interference, that court had the right to hear the evidence, and decide. Over its decision within that jurisdiction, we have no control, for the statute has not provided an appeal. The new trial is to be granted if the evidence submitted, whether cumulative or otherwise, is sufficient to satisfy that court 'that fraud, wrong, or injustice had been done to the United States.' The act was passed for the protection of the United States. It constitutes one of the conditions which Congress has seen fit to attach to the grant of a right to sue the United States. The suitor can not complain, for he accepted this condition of the jurisdiction when he commenced his suit. If the record showed affirmatively that the Court of Claims had granted a new trial after the term at which the judgment was rendered, under circumstances which gave it no jurisdiction—as, for instance, after the expiration of two years from the final disposition of the claim, or for some cause not within the provisions of the statute—a different case would be made from that which is here now, and one which it will be time enough to consider when it arises. We are all of the opinion that the decision of the Court of Claims, upon a motion by the United States, within the prescribed jurisdiction, is conclusive, and not subject to review. The claimant must rely upon his appeal from the final judgment upon the merits for protection against wrong under this form of proceeding."

Less than four years after the enactment of this statute as section two of the Act of June 25, 1868, it came before this court for construction in the case of *Ex parte* Russell, 13 Wall., 664. While not necessary to the decision of that case, the opinion discusses thoroughly its general purpose and scope. Mr. Justice Bradley, delivering the opinion of the court, states:

> "The section in question was undoubtedly intended to give the Government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to confer. It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before or on appeal from said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the court that the Government has been defrauded or wronged. The question is: What is meant by the final disposition of the suit from which the two years of limitation is to date? And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken), or, if none is taken, then to its final determination in the Court of Claims."

The decision of the Court of Claims in overruling claimant's contention is, without expression of opinion by the present court, rested on the authority of the Bellocque Case, 13 C. Cls., 195.

We challenge directly the rule of law enunciated in the Bellocque case. The fundamental error of that decision arises, we believe, from the fact that the court, as is stated in the opinion itself, considered that the statute should be "*interpreted by its own light, without any aid from judicial decisions on the general subject of new trials.*"

The general line of reasoning by which the court there reached its conclusion is as follows:

> "1. The statute does not limit the time within which the defendants must file the motion, therefore, they may lawfully file it at any time within the two years—

"on the last day, or in the last hour, or, as to the matter of that, in the last minute of the second year."

2. "They may file it so late that the court may not be able to act on it within the two-year period; and

3. "To impose on the court an obligation to hear and determine a motion, and at the same time allow the motion to be filed on a day or at an hour when it would be clearly impossible to hear and determine it within the two years, would be too patent an inconsistency to be imputed to the legislative authority."

The opinion then concludes with the statement that:

"As there is no statutory declaration that action upon such a motion shall *not* be taken *after* the expiration of two years, the right to take such action survives the lapse of that period, and it is competent for the court to hear and determine the motion whenever it shall thereafter be properly brought up."

This conclusion manifestly proceeds on the theory that, in the absence of an express statutory prohibition, the Court of Claims may grant a motion for new trial at any time, and that the statute in question, because it employs the term "may grant" within two years does not forbid the granting of the motion *after* that period. But this theory was directly refuted by the opinion delivered by Mr. Justice Brewer, in the case of *Belknap* v. *U. S.*, *supra*. In that case it was declared that the Court of Claims had *no* jurisdiction over the judgment after the term, except as conferred by Revised Statutes, 1088. The opinion states:

"As the new trial was granted at a term subsequent to that at which the original judgment was rendered (the terms of the Court of Claims beginning on the first Monday in December of each year, Rev. Stat., 1052), there would ordinarily be no power in the

> court to grant such new trial. (Cases cited.) But there is a peculiar provision applicable only to the Court of Claims, which is as follows (Revised Statutes, 1088)."

Then, after quoting in full the language of this section, the opinion continues:

> "In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years."

It is noticeable that although the decision in the Bellocque case would have met completely the contentions of the appellant in the Belknap case, it is nowhere mentioned in the opinion.

In connection with the Bellocque decision, above considered, we invite attention to the report of the decision subsequently rendered on the new trial of the case, reported in 16 C. Cls., 601. This report shows that the claimants, Bellocque, Noblom & Co., were insolvent; that the judgment which was rendered May 18, 1874, was paid in August; that the case was decided on the new trial in 1881; that gross fraud and perjury were found to have been committed; that the claimants did not appear personally or by attorney at the taking of testimony on new trial or at the trial, and that after adjudging the claim a fraud the court decreed that the claimants "be forever barred from prosecuting the same." The efficacy of this decree, when the judgment had been paid seven years previously, is not apparent.

In the Bellocque case (13 C. Cls., 197), the statement that the provisions of Revised Statutes, 1088, were "new and anomalous," was referred to as having been made by the Supreme Court. This language was employed by the

Court in the Ayres case, 9 Wall., 608, but the Court was then considering solely the question of the power given the Court of Claims by the statute to entertain and grant a motion for new trial during the pendency of an appeal, or after the determination of an appeal.

The provision of the statute involved in the Bellocque case and now brought here on appeal—that prescribing the time within which the Court may grant the motion instead of limiting the time for filing the motion—was neither new or anomalous.

By the rule of the common law, the trial court was required to dispose of the motion during the term.

Belknap *v.* U. S., *supra;*
Buckner *v.* Conly, 17 Ky. (1 T. B. M.), 3;
Truett *v.* Legg, 32 Md., 149.

By examination of the judicial systems of many states, it is found that although the majority merely require the motion for new trial to be presented within a limited time, a large number have not fixed any time for the filing of the motion, but have statutes similar to the one under consideration determining the period within which the Court may grant a new trial.

In the case of Vaughn *v.* O'Connor, 12 Nebr., 478, the Court considered the identical question raised here, under a statute which is in every material respect the counterpart of Revised Statutes, 1088. Section 983, of the Nebraska Code of Civil Procedure, provides:

> "It shall be lawful for the justice before whom a cause has been tried on motion, and being satisfied that the verdict was obtained by fraud, partiality, or undue means, at any time within four days after the entering of judgment, to grant a new trial," etc.

The first trial was had in the county court and determined February 14, 1880. A motion for new trial under

the above statute was filed within the four days. Affidavits on the motion were presented by both parties after the four days' period and the case was then presented to the court, the motion being granted. On appeal from the final judgment, on the new trial, the Court said:

> "The question, therefore, depends upon the construction to be given to the section above quoted. The language is:
>
> "'It shall be lawful for the justice * * * at any time within four days after the entering of judgment to grant a new trial,' etc.
>
> "The new trial is to be granted within four days, if at all; the authority of the justice of the peace or county judge to grant a new trial is derived wholly from the statute, and it must be exercised in the manner and within the time limited therein. Cox *v.* Taylor, 6 Nebr., 296; Fox *v.* Meecham, *id.*, 530. The county court had no authority, therefore, on the 8th day of March to set aside a verdict rendered on the 14th day of February."

The appeal was accordingly sustained, and the judgment, which had been erroneously set aside, was ordered reinstated.

In the case of Coopwood *v.* Pruett, 30 Miss., 206, the Court held that the failure to decide a motion for new trial within four months, as required by statute, rendered the subsequent proceedings void. It was held:

> "The new trial must be regarded as never having been granted. Consequently the case was at an end, and the Court had no jurisdiction to proceed to the new trial, which resulted in the judgment now complained of. That result is not affected by the fact that the defendant appeared and defended the suit upon the new trial, and made no objection to the ir-

> regularity of the proceedings. This might create a presumption that he has acquiesced in the irregular act of the judge, but in law it can not give authority and validity to a judicial act which is void for want of power, nor can it confer jurisdiction to take further cognizance of the case or conclude the plaintiff in error from denying the jurisdiction of the Court in proceeding with the new trial."

In the case of James *v.* Appel, 192 U. S., 129, this Court had to construe section 837 of the Arizona Revised Statutes, requiring that motions for new trial "shall be determined at the term of the court at which the motion shall be made." We quote the following language from the opinion delivered by Mr. Justice Holmes:

> "The Arizona par. 837 is copied from a similar section in the Texas Code, act of May 13, 1846, Sec. 112, Hart's Dig. Texas Code, Art. 766, 1 Sayles' Texas Civ. Stat., Art. 1372. Long before its adoption in Arizona the latter section had been construed in Texas as mandatory, and as discharging a motion by operation of law if not acted upon at the same term. It was held to put it out of the power of the Court to postpone the motion for a new trial to the next term, and then to act upon it. If the requirement could be avoided by a continuance, it would be made almost nugatory. McKean *v.* Ziller, 9 Tex., 58; Bullock *v.* Ballew, 9 Tex., 498; Bass *v.* Hays, 38 Tex., 128."

The principal other decisions in the several states having similar statutes upon this subject either requiring the motion to be determined within a fixed number of days, or within the term, or within the next succeeding term after judgment, all of which support the claimant's contention in this case, are as follows:

Ex parte Highland Avenue & Belt R. Co., 105 Ala., 221;
Hundley *v.* Yonge, 69 Ala., 89;
Fitzpatrick's Admr. *v.* Hill, 9 Ala., 783;
Ruff *v.* Hand (Ariz., 1890), 24 Pac., 257;
Walker *v.* Jefferson, 5 Ark., 23;
Redman *v.* Reynolds, 114 Ind., 148;
Crews *v.* Ross, 44 Ind., 481 (487);
Hays *v.* May, 35 Ind., 427;
Ferger *v.* Wesler, 35 Ind., 53;
Buckner *v.* Conly, 17 Ky., 3;
England *v.* Duckworth, 75 S. Car., 309;
Clements *v.* Buckner (Tex., 1904), 80 S. W., 235;
Lightfoot *v.* Wilson, 11 Tex. Civ. App., 151; 32 S. W., 331;
Laird *v.* State, 15 Tex., 317;
McKean *v.* Zillner, 9 Tex., 58.

It can not be said that the appellant waived any rights by proceeding to trial after the granting of the motion for new trial. There was no right of appeal from the order, and it was his duty to participate in the new trial, and bring up this question on appeal from final judgment. U. S. *v.* Young, 94 U. S., 258.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, we contend that should this Court decide that it was necessary for the Court of Claims to act on the motion for new trial within two years, the appeal should be sustained because there was no legal application for new trial under Sec. 1088 of the Revised Statutes, presented within the two years.

The statute contemplates the offering of evidence. All that was done in this case was the filing of a motion merely stating that the Indian defendants were not in amity. it

was not specified in what particular the evidence at the former trial was rebutted or impeached.

The necessity for the submission of evidence as a basis for the action of the Court in granting such a motion was held by this Court in *ex parte* District of Columbia, 180 U. S., 250, adopting the decision of Judge Nott on the same question in Ealer's Case, 5 C. Cls., 708.

At no time within the two years' period—a period "of limitation," so designated by Mr. Justice Bradley, in *ex parte* Russell, quoted *supra*—had the defendants presented an application for new trial which the Court, had it been so inclined, had jurisdiction to allow under Sec. 1088.

THIRD ASSIGNMENT OF ERROR

The claimant further contends that the election of the parties not to reopen the award of the Secretary of the Interior, when merged into the judgment of October 11, 1892, was a final conclusion of the suit, except in so far as questions of fraud may be concerned.

Section 4, of the Indian Depredation Act, of March 3, 1891, is, in part, in the following words:

> "That all unpaid claims which have heretofore been examined, approved and allowed by the Secretary of the Interior, or under his direction, in pursuance of the Act of Congress * * * approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration by said Court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case, and try the same before the Court." (26 Stat. L., 851.)

In a case submitted to the Court for judgment under this section, the only facts into which inquiry can be made, in the absence of fraud, are (1) whether it is an unpaid

claim; (2) whether it has been examined, approved and allowed by or under the direction of the Secretary; (3) the amount found due; and (4) that the parties elect not to reopen the award of the Secretary. Having found these facts, and there is no question that all exist in the present case, the mandatory duty of the Court is to enter judgment for the amount of the award.

The duty is imposed upon the Assistant Attorney General defending the case to satisfy himself that the award was proper; that the evidence he examines and the result of his investigations convince him of the liability of the defendants. He is permitted by the statute to act in a quasi-judicial capacity. As was said of the Court's action in the premises by Judge Weldon in the case of Hyne *v.* U. S., 27 C. Cls., 113:

> "Counsel representing both parties have, by the terms of the stipulation, signified the unwillingness of both to disturb the finding of the Secretary of the Interior Department, and upon that condition, the Court is by the terms of the statute compelled to render a judgment for the claimant in the sum adjudicated to be due by the action of the Secretary. The finding and allowance of the Interior Department, unless disputed by the claimant or the United States, becomes in this court an award, upon which it is the duty of the Court to render a judgment, affirming to the claimant the amount allowed by the action of the Department. We determine no question of law applicable to the original controversy, all differences in fact and in law become merged in the determination of the Secretary in the allowance of the amount which he finds due the claimant."

The effect, therefore, of the action of the Court was not to grant a new trial of any issue previously heard or determined by it, but to review, on the motion of one As-

sistant Attorney General, the action of his predecessor in office, without having means of knowing what evidence he had before him when he decided to accept the Secretary's award.

A motion for new trial on questions of fact, and a motion under Sec. 1088 of the Revised Statutes can only be based on errors of fact, is always addressed to the discretion of the Court. Can it be considered that Congress intended to permit the Court to review on such a motion matters entrusted by law to the discretion of an attorney—matters into which at the time of rendering judgment it, the Court, had no authority or power to inquire.

The matter alleged as error in the motion—the non-amity of the defendant Indians—was not jurisdictional. Upon this point we need only refer to the following decisions of this Court:

In the case of Leighton *v.* U. S. (29 C. C., 288; 161 U. S., 291), the claim had been allowed by the Secretary of the Interior, although the tribe was not in amity, and no treaty authorized payment for depredations. The Court of Claims held that amity was jurisdictional under the second paragraph of Section 1 of the Act. (Nott and Davis, J. J., dissenting.) The Supreme Court, however, in a unanimous opinion affirming the judgment of the Court of Claims, rests its decision wholly upon the fact that the claimant had elected to reopen the case, and after deciding that the claim can not be sustained under the first jurisdictional clause for want of amity, or under the second for absence of treaty providing for payment, concludes:

> "It follows, therefore, that though, under the terms of the second jurisdictional clause, the Court of Claims had jurisdiction over this claim, yet, the case having been reopened by the claimant, the Court of Claims properly proceeded to inquire into its merits, and correctly found that there was no law or treaty upon which to base a liability of either the United States or the Indians."

The difference between the Leighton case and the present case is primarily that in the one at bar neither party has elected to reopen the case, but both parties have expressly accepted the findings of the Secretary on the questions which are so declared by the Supreme Court to be questions of liability—not jurisdiction—and the Court has entered judgment for the amount fixed as the extent of that liability.

That amity is not jurisdictional or in all cases material to be proved in allowed claims under the second jurisdictional clause of Section 1 of the Act, will further appear by reference to the cases of Marks *v.* U. S. et al., 161 U. S., 297; and Johnson *v.* U. S., 160 U. S., 546.

In Price *v.* U. S., 174 U. S., 373, the Court states:

> "The conclusions of the Secretary, both as to *liability* and amount, were placed before the Court for consideration by the election of the defendants to reopen the case."

FOURTH ASSIGNMENT OF ERROR

This assignment charges error in allowing the motion filed after the term at which judgment was entered for a cause not authorized by Sec. 1088 of the Revised Statutes, in that the error alleged was an error of law, not of fact.

The Court has no jurisdiction under this section to consider errors of law.

In re District of Columbia, 180 U. S., 250.

Until the decision of the Marks Case, 28 C. Cls., 171, the Court of Claims had adopted the prior ruling of the Interior Department in determining these claims that the existence of treaty relations with the Indian defendants was equivalent in law to "amity." Such was the law as construed at the time the judgment of October 11, 1892, was rendered, and the existence of treaties with the

Cheyenne Indians fully satisfied the requirements of the Court.

Section 1 of the Act of March 3, 1891, reads in part as follows:

> "First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.
>
> "Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department."

The Marks decision, rendered February 27, 1893, expressly limits the effect of this ruling to cases coming before the Court under the first jurisdictional clause of Section 1 of the Act. It was not until the decision in the Leighton Case, 29 C. Cls., 288, rendered May 29, 1894, that the Court extended the rule to "allowed" cases under the second clause of Section 1. Shortly after the Leighton decision was announced, the motion for new trial was filed in the present case, not because facts could be then established which could not have been established before the judgment was rendered, but to take advantage of the changed construction of the law.

This might have been possible if the application had been seasonably presented at the term at which the judgment was entered, but we submit that it is not within the jurisdiction conferred by Sec. 1088 of the Revised Statutes.

FIFTH ASSIGNMENT OF ERROR

Claimant's contention under this assignment of error is that the alleged wrong or injustice, if any, affected the Indian defendants, and not the United States, and the mo-

tion could not be allowed under Revised Statutes, 1088. The language of this section expressly provides for the granting of a motion for new trial "on motion on behalf *of the United States,*" upon such evidence as shall satisfy the Court "that any fraud, wrong, or injustice in the premises has been done *to the United States.*" At the time this statute was passed the United States were, as they are now, under the general jurisdiction of the Court, the sole defendants in cases pending in the Court of Claims. When Congress provided for the adjudication of the District of Columbia claims by that Court, it provided that motions for new trial should be filed within twenty days, and the Court, in construing that provision, has held that all motions for new trial must be filed within twenty days, although on appeal to the Supreme Court, that question was not decided. (180 U. S., 250.)

There is no provision whatever in the Indian Depredation Act which creates directly or indirectly any special rights of claimants or defendants in respect to new trials, so that the principles of general law applicable thereto must necessarily govern. As was held by the Court of Claims in the case of McCollum *v.* U. S., and Rogue River Indians, 33 Ct. Clms., 469, a motion filed after the term under these circumstances must necessarily be considered under the provision of section 1088.

In this case, the Indian defendants are identified and had, and now have, annuities payable to them more than sufficient to satisfy the judgment rendered October 11, 1892. (Appropriation under Sec. 15, Act of March 3, 1891, Ch. 543—Established trust fund of $1,000,000 for Cheyenne and Arapahoe tribes jointly and annuity of $50,000.)

Concerning the liability of the United States, under the Indian Depredation Act, Chief Justice Nott, in the case of Love, administrator, *v.* United States, summarized the conclusions, in which the Court agreed, as follows:

"1. The Indian Depredation Act is jurisdictional; it does not create liabilities, nor assume them further than this, that where a depredation is shown to have been committed by Indians, but their tribes can not be identified with sufficient certainty to be charged with the loss, or where a tribe is without funds to satisfy a judgment, the United States assume the Indians' liability. But the jurisdiction intended by the act is commensurate with and includes all legal liabilities of Indian defendants for depredations committed on citizens.

"2. The only liabilities contemplated by the act (apart from the above, which are in the nature of guaranties), are those of Indians. The Act 28th February, 1859 (11 Stat. L., p. 388, Sec. 8), rescinded all liabilities on the part of the United States." (29 Ct. Cls., 347.)

Construing the terms fraud, wrong, or injustice in their commonly accepted and legal significance, the question to be determined is whether the existence of fraud, wrong, or injustice to the United States can occur in the absence of any responsibility or liability on the part of the United States to pay the judgment complained of out of its own funds. We need not consider at this time the reasonings which led the Court of Claims to construe the Act of March 3, 1891, as merely conferring the jurisdiction to settle claims, the liability for which had theretofore existed. It has been uniformly held that such is the proper construction of the act. We contend, therefore, that, in order to give the court jurisdiction to act upon a motion for new trial filed after the term, under the provision of section 1088, the case must be one in which the United States are liable to pay the judgment with the public funds.

There may be cases where fraud, wrong, or injustice is done the Indian defendants, but it is not to be supposed that they are without relief. They have all rights ordinar-

ily accorded litigants in courts of law, but do not, we contend, have the unusual advantage of additional time reserved to the United States in certain cases by section 1088 of the Revised Statutes.

The identification of the Indian defendants, in a case where the tribe so identified has annuities, is in effect the discharge of the United States from all interest in a suit under the Act of March 3, 1891. As decided by the Love case, *supra,* the only liability in any event is secondary—that of a guarantor.

SIXTH ASSIGNMENT OF ERROR

The question presented under this assignment of error concerns only the liability of the Indian defendants.

The motion for new trial was filed solely in behalf of the United States, one of the two defendants, on the ground that wrong and injustice had been done *the United States* in the rendition of judgment. In fact, under Revised Statutes, Sec. 1088, any motion embracing both defendants would have been unauthorized.

This motion was granted, the order of the Court being evidenced merely by the endorsement of the word "allowed" on the back of the motion.

It is well settled by the weight of authority that a motion for new trial may be allowed on behalf of one of several defendants, without disturbing the verdict or judgment as to the other defendants. In the case of Albright *v.* M'Tighe, 49 Fed. Rep., 817 (820), it is said:

> "The real question is, what is the effect of this error as to one joint wrongdoer upon the verdict rendered jointly against all? Upon this question there is a conflict of authority, the older cases, and perhaps some modern ones, holding that one of several defendants in an action of tort can not be awarded another trial

unless all are. Bond *v.* Sparks, 12 Mod., 275; Parker *v.* Godin, 2 Strange, 813; Doe de Dudgeon *v.* Martin, 13 M. & W., 810; and note *a*, 2 Tidd., Pr. 911.

"The better doctrine is, however, otherwise, as the cases abundantly show; and while some of them endeavor to establish distinctions from the old rule, others boldly repudiate it or ignore it altogether."

For the decisions on this question, see the following cases:

Houston *v.* Bruner, 39 Ind., 376;
Terfenning *v.* Gallup, 8 Iowa, 74;
Bicknell *v.* Dorion, 16 Pick., 478;
Brown *v.* Burruss, 8 Mo., 26;
Bremen Bank *v.* Unnath, 55 Mo. App., 43;
People *v.* N. Y. Com. Pleas, 19 Wend., 118;
Heffner *v.* Moyst, 40 Ohio St., 112;
Union Bank *v.* McClung, 28 Tenn. (9 Humph.), 98;
Roberts *v.* Heffner, 19 Tex., 129;
Boswell *v.* Jones, 1 Wash., 322;
Price *v.* Harriss, 25 E. C. L., 159; 10 Bing., 331.

Such being the general rule, it remains to determine whether there is anything peculiar to the determination of Indian depredation claims by the Court of Claims preventing its application to the present case.

Section 4 of the Act of March 3, 1891, 26 Stat., 851, directs the Attorney General "to file a notice of any counter-claim, set-off, claim of damages, demand or defense whatsoever of the Government or of the Indians in the premises."

The second proviso to that section authorizes the Indians to appear and defend by their own attorney if they shall choose to do so.

Section 5 directs the Court to:

> "Render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified."

Section 6 then provides:

> "That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by the members of which, the Court shall find that the depredation was committed, and shall be deducted and paid in the following manner:
>
> "First, from annuities due said tribe from the United States;
>
> "Second, * * *"

Section 10 authorizes an appeal by "the claimant, or the United States, or the tribe of Indians."

The two defendants may, therefore, sever in their pleadings or defense to the action. The United States may plead a set-off or counter-claim; the tribe may plead their innocence of the depredation and the Court may find, under Section 5, that the identity of the Indian depredators can not be ascertained, and render judgment only against the United States.

Either defendant may feel aggrieved at the judgment and take an appeal to this Court.

We submit, therefore, that, as the defendant Indian tribe did not see fit to apply for a new trial, or appeal from the judgment of October 11, 1892, and the United States applied for a new trial only in its own behalf, the judgment, in so far as the liability of the tribe was fixed by that judg-

ment, remained unaffected by the granting of the motion on April 13, 1896, and it was error in the Court of Claims to dismiss the petition as to both defendants on April 23, 1906.

Respectfully submitted,

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